

Comments from Environmental Groups

Citizens for a Better Environment John Muir Chapter - Sierra Club Wisconsin's Environmental Decade

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Dear Ms. Wiese and Ms. Martin:

Thank you for the opportunity to comment on the DRAFT Memorandum of Agreement between Wisconsin Department of Natural Resources and the U.S. Environmental Protection Agency.

To be clear, the Sierra Club, Citizens for a Better Environment and Wisconsin's Environmental Decade have questioned for several years the need for "regulatory reinventions" at the state and/or national levels. The Wisconsin law was adopted over our objections although some accommodations of our concerns were amended to the Governor/WDNR proposal by Senator Brian Burke. As you know, the ECOS Principles were never signed off on by the major national environmental groups.

We are skeptical that good public policy will result from this MOA or the implementation of ECOS or the WI Environmental Cooperation Pilot Program ("Break Through") legislation, 1997 WI Act 27. We are also skeptical of this as a model for success or the need for offering these programs. These experiments in regulatory flexibility seem to be increasing the burden on the state and federal agencies without clearly demonstrating how in the long run they will learn how to institutionally resolve their own pressing issues of staff moral, dwindling resources, lackluster enforcement programs, and an expanding regulated community.

On the other hand, polluters get an economic advantage and tie up potentially large amounts of staff time with little or no promise of anything beyond compliance with existing regulations on a company by company basis. Despite the rhetoric, we do not see

superior performance being achieved. Studies of voluntary programs around the country and the world indicate that a firm bottom line, an effective enforcement program, brings the best results from industry.

SCOPE of MOA. The MOA covers only facilities complying with WI Act 27. We request that adequate public notice be provided of any EPA-WDNR discussions or actions which would broaden the scope of this MOA or set up any other MOA or program for regulatory flexibility.

ENFORCEABILITY: (1) At the EPA's request, the WI Attorney General has written an explanatory letter asserting that WI Act 27 does not impede WDNR's ability to enforce existing law. This was also the general understanding when Act 27 was debated. We request that the gist of the 1/25/99 Attorney General Opinion should be included on page 8 of the MOA, in addition to incorporation by reference. Readers of this MOA should be explicitly aware of this important opinion as it relates to the rest of the MOA.

(2) The MOA reiterates the language of Wisconsin's new pilot program on Page 8, "As provided in the Environmental Cooperation Pilot Program, if the company complies with this provision of the statute and the violation does not present an imminent threat, nor will it cause serious harm, to public health or the environment.." However, "Imminent and serious" are in the eye of the beholder. These terms must be explicitly defined for the purposes of the Program in general, and the MOA specifically. These terms must be interpreted by the WDNR or EPA, not the company. At a minimum, the IIT should be charged with review of Wisconsin's Enforcement Deferral and Compliance Schedules.

GOALS of the Wisconsin Environmental Cooperation Pilot Program, Act 27: On page 4-5, the edited list of Act 27 goals should be replaced with the exact language of the goals from the Act. Many people will not be familiar with the detailed goals of this new law.

ECOS PRINCIPLES: Although the DRAFT MOA lists the ECOS principles, the MOA does not adequately address or integrate the ECOS principles into the MOA. For instance, Stakeholder involvement includes "...effective stakeholder involvement meaningful involvement in the design and evaluation of innovation...." We find very little in the MOA (see the single paragraph on page 9 of the DRAFT) to assure the public will have such access. (see evaluation and public participation sections for some suggested additions)

EVALUATION: WI Act 27 sets up a 5 year pilot program to evaluate the need for regulatory flexibility. Our organizations intend to evaluate this law by monitoring the overall process, the specific company agreements and the performances of DNR and the facilities and DNR and the EPA. We note that the MOA includes EPA in these evaluations through an Interagency Innovations Team (IIT).

1. We suggest that these evaluations begin with a baseline condition. For instance, the agency baseline should include the types and extent of variances granted in the past 5 years by WDNR.

2. The facilities are required to prepare their own baseline condition using the protocol for evaluating environmental management systems (EMS) developed by the Multi-State Working Group and administered by the University of North Carolina as part of an anonymous database. The facility baseline is also valuable in evaluating the effectiveness of WI Act 27. All the data being compiled is publicly available under the Freedom of Information Act. baseline should be made publicly available. Therefore, the facility baseline should be made publicly available.
3. There are only two sentences on page 6 of the DRAFT MOA, concerning "... developing protocols for measuring the success of pilots." This does not adequately reflect the importance of and need for EPA and other stakeholder involvement in measuring success. Evaluation is critical for all parties. All parties should participate in developing and completing the evaluation.
4. Furthermore, this section needs to be expanded beyond "protocols" and discuss the development of indicators of success, both for the overall agreement, MOA, and for specific company projects. The MOA implies a passive role for EPA. EPA and other stakeholders should be involved unequivocally in both developing the indicators of success and the protocols for measuring success. An advisory group or expanded IIT, including business and environmental representatives, should be created to assist in this process.

PUBLIC PARTICIPATION: WI Act 27 explicitly reflects the need for, the citizen's right and the expectation that the public will be involved in developing, piloting and evaluating regulatory innovations. The commitment made in the single paragraph on page 9 of the DRAFT MOA does not adequately address the challenge of getting the public meaningfully involved in projects. From experience, we know that this requires dedicated human resources, access to information and technical assistance to the public independent of the "Project company". How will the IIT get those resources to the public at each site. Meaningful public participation requires access to decision making How will the IIT make the public involvement meaningful if the Project company and/or the DNR are reluctant"

In addition, explicit provision needs to be made for public participation on the MOA's overall process. One such place is on page 10 where the DRAFT states that the IIT will assure that the agencies respond to Program companies' requests. This responsibility should be expanded to include requests of other stakeholders and in particular the public. Another place is the activities of the IIT. How will the public's right to know be provided for and protected in IIT communications, meetings and proceedings? Each of the four phases of the IIT Process relating pilots should be open to public scrutiny.

The MOA indicates that each cooperative agreement will ... constitute a permit or permit modification that is enforceable under federal law. If that is the case, the DNR must provide formal opportunities for public comment on these revised permits (as it does for any "normal" permit modification), as well as more informal input and review for area residents.

EXAMPLE OF "INNOVATION": We are concerned about an example used in the Wiese presentation at the Open House on this MOA. The example concerns a waiver from normal testing procedures. Consideration of a waiver from testing should include: raw material and treatment inputs, the chemistry of the process, byproducts and breakdown products, as well as actual historical testing data. Granting a waiver should not rely on historic testing data alone.

We are also concerned that the examples that are often given to the media and potentially interested companies stress waivers from normal procedures. As we have publicly stated, environmental groups are on record in support of some changes to permit issuing and testing. For instance, we can all agree that a single consolidated permit that covers any pollution to all media, air, land, water, could be beneficial. This is the type of 'environmental cooperation' we would like to see as a pilot project. On the other hand, these pilots should not be used just to cut costs and paperwork for industry without cuts in pollution.

Thank you for the opportunity to share the concerns of our organizations and members. Please feel free to contact us for further clarification.

Sincerely,

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